# THE CONSTITUTIONALITY OF RACE DISTINCTIONS AND THE BALTIMORE NEGRO SEGREGATION ORDINANCE.

An ordinance recently passed by the City Council of Baltimore setting apart different residential districts for whites and negroes brings up the question of the legality, under the United States Constitution, of race distinctions in a phase not yet presented to the Supreme Court and suggests a review of the decisions already rendered bearing on the case at hand.

Briefly, the Baltimore ordinance provides that the white sections shall consist of those parts of streets or alleyways lying between two adjacent intersecting streets, in which the majority of the residences are, at the date of the passage of the ordinance, inhabited by whites; those parts of streets as above described where the majority of the residences are inhabited by negroes constitute the negro section. After the date of the passage of the ordinance it will be unlawful for any white person to take up his residence in a negro block, or a negro in a white block, and these provisions are in addition sanctioned by fines and imprisonment. It is especially provided, however, that the ordinance does not require anyone to change the residence which he may inhabit at the date of the passage of the ordinance, that it does not affect the residence of white or negro servants or employees, and that it is not to be so construed as to prevent any person from purchasing or owning property in the city.

What the practical results of such a law would be, and just how it would affect the interest of blacks, whites and the owners of property is a much more difficult question than that presented by separation of the races in schools or street cars. We shall therefore undertake first an examination of the decided cases bearing on the subject in order to discover if possible the principles to be applied.

The only provisions of the Constitution bearing on the subject are found in the first section of the Fourteenth Amendment:

"Nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

In the *Slaughter-House Cases*,[1] where the Fourteenth Amend-

[1](1872) 16 Wall 36, 71.

ment was first brought before the court, it was held that the purpose of the last three amendments was

"the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."

This being their main purpose, the court refused to apply them generally to the rights of all citizens. Of course, the court has since applied the amendment so as to protect the rights of any person, as the amendment on its face reads. Still, what the court said was the main purpose of the act was no doubt the truth and the court might well have continued to examine with especial strictness any asserted violation of the rights of the negro.

In *Strauder* v. *West Virginia*,[2] a state law excluding negroes from jury service was declared unconstitutional. The court say, speaking of the amendment:

"What is this but declaring that the law of the States shall be the *same* for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?"

Also, that it gives,

"the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."

The case of *Hall* v. *DeCuir*[3] came before the court two years before *Strauder* v. *West Virginia*. Here a law of Louisiana had provided that negroes must be given the same accommodation in public conveyances as whites. In a suit by a negro passenger against an interstate steamboat owner, the court held that this law was a direct regulation of interstate commerce and hence unconstitutional. They further stated that this left the carrier under the common law alone, unaffected by any state statute. It would seem that the court should have gone on and determined whether or not, under the common law, the carrier could separate the races.

[2](1879) 100 U. S. 303, 307.
[3](1877) 95 U. S. 485, 503.

Justice Clifford alone, in his concurring opinion, went into this question and held that, under the common law, carriers could separate the races. His is merely a restatement of the arguments brought out in cases decided in the state courts, some of which were decided before, and some after the adoption of the amendments. The following quotation gives the essence of the reasoning:

"His [the carrier's] authority in that regard * * * arises from his ownership of the property, and his public duty to promote the comfort and enjoyment of those travelling in his conveyance."

It may also be noted that Justice Clifford dissented in *Strauder* v. *West Virginia* cited above.

In *Pace* v. *Alabama*[4] the court held that adultery between blacks and whites could constitutionally be punished more severely than the same crime committed between persons of the same race, on the ground that the white and the black were punished alike—that is, there was no discrimination.

In 1889, the case of *Louisville, New Orleans & T. R. Co.* v. *Mississippi*[5] came before the court. A statute of Mississippi required railroads to provide separate accommodation for the races. This was, however, a suit by Mississippi against the railroad for violating the law. The only question raised in the case was whether it was an interference with interstate commerce. The railroad company did not raise the question which it might have raised, as to whether this was a reasonable regulation as regards the company.

Finally, in *Plessy* v. *Ferguson*[6] decided in 1895, the question of the constitutionality of the so-called "Jim Crow" laws as a deprivation of the rights of the individual was squarely raised. A law of Louisiana, which had been construed by the Louisiana courts to apply only to intrastate commerce, compelled the railroads to provide equal but separate accommodations for the white and colored races, to assign each individual to the one car or the other according to their race, and imposed fines and imprisonment on those going into the wrong car. The petitioner was indicted under the act, and upon the state court's overruling a plea based on the unconstitutionality of the act, plaintiff sought writs of prohibition and *certiorari* from the Supreme Court.

[4](1882) 106 U. S. 583.
[5](1890) 133 U. S. 587.
[6](1896) 163 U. S. 537, 543.

The court dismiss summarily the argument that the act creates slavery or involuntary servitude as an absurdity, but add:

"A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the *legal equality* of the two races, or rëestablish a state of involuntary servitude."

Here is an unqualified statement of the constitutionality of race distinctions, and, though the court continue, under a second heading, to treat of the Fourteenth Amendment, this statement would seem to apply to the Fourteenth as well as the Thirteenth.

Considering now the Fourteenth Amendment the court say:

"The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, or even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power."

The court then cite cases of separate schools, and prohibition of intermarriage, and other cases in the state and lower Federal courts where "Jim Crow" laws had been held constitutional. Again the court say:

"We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby regulate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition."

It will be noticed that the court refused to examine into the motives of the legislature, or even whether the effect in fact would

be to oppress or degrade the negro. It certainly departed from the spirit of *Strauder* v. *West Virginia.* Mr. Stevenson, in language quoted below, truly says that distinction connotes a difference and Justice Harlan, in his dissenting opinion, maintains, in harmony, we think, with the spirit of those who adopted the amendment, that,

"in respect of civil rights common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights."

It will also be noticed that the court distinguishes the present case from *Strauder* v. *West Virginia* and the line of cases following it on the ground that here is a distinction but not a discrimination. So Mr. Gilbert F. Stevenson in his "Race Distinctions in American Law"[7] says:

"At bottom, there is a vast difference between the distinction and the discrimination. * * * A race distinction connotes a difference and nothing more. A discrimination necessarily implies partiality and favoritism."

Applying this doctrine, if a statute can be devised segregating the races in cities, which does not on the face of the statute discriminate against either race, is a race distinction. Neither race is restrained more than the other. The question then reduces itself to whether a race distinction in the matter of residence is illegal while a race distinction in the matter of public conveyances, public schools, and marriage is not. Looking at it as a logical proposition, there would seem to be no distinction; and the court were brought face to face with this very question. In answer to the objection that such reasoning would authorize state legislatures

"to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color,"

the court say,

"The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in

[7] 43 Amer. L. Rev. 29 *et seq.*

good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class,"

citing *Yick Wo* v. *Hopkins,*[8] and other cases.

The court then proceed to examine the law as to its reasonableness:

"So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures."

The question then resolves itself into this: Is segregation of the races in residential districts unreasonable? Apply the criterion of reasonableness set out in the *Plessy* case—it must be "enacted in good faith for the promotion of the public good and not for the annoyance or oppression of a particular class." It will be remembered that we presumed that the statute provided essentially equal advantages for each class; granting this, it is logically impossible to say that the law is enacted for the oppression of a particular class. Is it then enacted in good faith for the public good? The legislature is to be allowed a large discretion in the matter. Is it clearly unreasonable? Under the reasoning of *Plessy* v. *Ferguson* it could hardly be said to be unreasonable.

It must be admitted that the method of the court in determining the question of reasonableness is unsatisfactory and we shall have to attempt to get some sort of definition for this elusive term.

Why would a separation in street cars based on color of hair be unreasonable? It must be because in the distinction itself there is nothing that can possibly promote the public good; it is purely arbitrary. The court must therefore have held in *Plessy* v. *Ferguson* that there was some reason at least, inherent in the nature of blacks and whites, that would justify their separation. The court would have been more candid if it had quoted the language used

[8] (1886) 118 U. S. 356.

in the early case of *West Chester etc. R. R. Co.* v. *Miles*[9] and cited in many later cases:

"It is not an unreasonable regulation to seat passengers so as to preserve order and decorum, and to prevent contacts and collisions arising from natural or well known customary repugnancies, which are likely to breed disturbances by a promiscuous sitting."

And again the court say:

"The question is one of difference, not of superiority or inferiority. Why the Creator made one black and the other white, we know not; but the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to His creatures when He intends that they shall not overstep the natural boundaries He has assigned to them. The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. * * * The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature."

There would seem, however, to be some further meaning to reasonableness than that already given. Professor Freund, in his work on the Police Power reaches this conclusion:

"The question of judicial power practically confines itself to a third meaning of reasonableness, namely moderation and proportionateness of means to ends."[10]

Justice Holmes speaking for the Supreme Court of Massachusetts, in the case of *Rideout* v. *Knox*[11] says:

"Difference of degree is one of the distinctions by which the right of the legislature to exercise the police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be, except by the exercise of the right of eminent domain."

This, it seems to us, is a valid criterion of reasonableness. It might be expressed this way—the value of the right taken away

[9](1867) 55 Pa. St. 209.
[10]Sec. 63.
[11](1889) 148 Mass. 368.

must not be disproportionate to the good to be accomplished. This meaning has not often been clearly stated because police regulations have generally been declared unconstitutional on the ground that they were arbitrary in that they had no relation to the public welfare or in that they made a classification for which there was no reason, thus unduly favoring or disfavoring a particular class. Take for example, the language of the court in the case of *State* v. *Vandersluis*:[12]

"The only limit to the legislative power in prescribing conditions to the right to practice a profession is that they shall be reasonable. * * * By the term 'reasonable' we do not mean expedient, nor do we mean that the conditions must be such as the court would impose if it were called on to prescribe what should be the conditions. They are to be deemed reasonable where, although perhaps not the wisest and best that might be adopted, they are fit and appropriate to the end in view, to wit, the protection of the public, and are manifestly adopted in good faith for that purpose. If the condition should be clearly arbitrary and capricious; if no reason with reference to the end in view could be assigned for it; and, especially, if it appeared that it must have been adopted for some other purpose,—such for instance as to favor or benefit some persons or class of persons,—it certainly would not be reasonable, and would be beyond the power of the legislature to impose."

Or take this quotation from *Holden* v. *Hardy*:[13]

"The question in each case is whether the legislature has adopted the statute in the exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class."

But this ground, which is the simplest one on which to hold an exercise of the police power unreasonable, is put out of the question by the *Plessy* case.

Examining the Baltimore ordinance then by the criterion suggested above, the first question to be answered is, what right is curtailed by this ordinance? The answer is, the right to live where one wants to. No one is compelled to move, but if he does move, in the future he cannot move into certain blocks. Grant that this right is a more fundamental one than the right to sit in any part of a street car, still the separation of blacks and whites is for the purpose of securing peace and good order, and this is a justification for the sacrificing of the fundamental rights. If there is a

[12](1889) 42 Minn. 129.
[13](1898) 169 U. S. 366.

mutual repugnance between the races, is it not reasonable to separate them in their dwellings when it is remembered that neither the whites' nor the negroes' right to live where they will is curtailed any more than is absolutely necessary to secure the desired separation? The question being a matter of judgment it must also be remembered that the courts make a large allowance for legislative discretion.

Take for instance, the laws against miscegenation. The right to choose a mate is, we suppose, as fundamental and as valued as the right to choose a residence. It is no justification for limiting this right to say that it is no harder on the blacks than it is on the whites. The question is, is the end—the prevention of mixed marriages—sufficient to justify a curtailment of this fundamental right. The Supreme Court said in *Plessy* v. *Ferguson* that it was. Is prevention of contact which might result in breaches of the peace less a justification for the denial of an equally valuable right? *West Chester R. R. Co.* v. *Miles*[14] held that any commingling of the races even on street cars was pernicious for the very reason that "the tendency of intimate social intermixture is to amalgamation contrary to the law of races."

Finally in this connection it may be recalled that this is a municipal ordinance and that, by the common law, municipal ordinances must be reasonable. If there be any further refinements in the determination of what is *per se* reasonable, we despair of ever discovering the meaning of the word. It is to be doubted, however, whether this rule is anything more than surplusage in our Federal law, since, by the provisions of the United States Constitution, every exercise of the police power by our legislatures must, contrary to the English theory of Parliamentary omnipotence, be reasonable. And, so far as the question is as to the extent of the power delegated to the city, that is a question of state law on which the United States courts will follow the decisions of the state courts. That is, we do not believe that the United States courts would determine this question by holding that the ordinance would be unreasonable for the city though reasonable for the State.

Finally the point may be made that the reasoning in *Plessy* v. *Ferguson* was unnecessary. Professor Freund in discussing this case says:[15]

"The following seems to be the strongest argument in favor of the legality of compulsory separation: it is legitimate for trans-

[14] *Supra.*

[15] Sec. 699c.

portation companies to provide separate accommodation for the two races, just as it may provide ladies' waiting rooms or cars for smokers, as conducive to the comfort of the parties thus separately accommodated. Transportation companies may be subjected to public control in the interest of public convenience and comfort, and if separate accommodation is generally demanded, and not unreasonably burdensome it may be compelled by law. It then follows also that the failure to provide it or the failure to maintain it on the part of the railroad company, may be visited with penalties, and a passenger who intrudes himself into a compartment in which he is not wanted may likewise be punished. The facts in Plessy *v.* Ferguson did not call for more than a recognition of these principles."

This argument however merely begs the question. In so far as the "Jim Crow" regulations of railroad companies are upheld as being for the promotion of the public peace and good order the same reasoning would uphold state separation. In so far as such regulations by the companies are upheld as a valid use of one's private property this reasoning can not be used in favor of the State, and that the State has large powers in the regulation of public service corporations is no argument for its interfering with the rights of individuals under the guise of a regulation of the corporation.

Our position has been all along that the essential right impaired was that of the individual citizen, be he black or white, to live where he wishes. There are also other rights incidentally impaired. The owners of property in negro blocks may claim that the demand for their houses is lessened because only negroes can live in those houses. The owners of the white blocks may make a similar claim. But on the whole the character of the demand is not changed; it is, as a matter of fact, essentially the same now as it will be after the passage of the ordinance. As will be shown later, neither race is crowded into a smaller space than it now occupies and thus any complaint that a large area is set aside for a population that will not now fill it hence causing a lack of tenants, is avoided. In other words, presuming every house to be now occupied, the ordinance will not necessarily cause any houses to remain idle for lack of the proper class of tenants.

Another objection is that a man who owns a house in a forbidden district will be deprived of his property because he can not live in it. To this as indeed to the objections made above, if they be not already fully answered, it is replied that if the State can tell every man where he shall and shall not live, the person merely incidentally injured by the carrying out of the general plan of

segregation has no remedy. This principle would seem to be laid down by the Supreme Court in *L'Hote* v. *New Orleans*[16] where the plaintiff claimed that the segregation of women of lewd character within a definite area depreciated the value of his property unfairly as between himself and the owners of property outside the district. But the court denied relief on the ground that the injury was merely incidental to the city's right to segregate. While this case is not on all fours with the present case, the following reasoning would seem to be applicable:

"Some must suffer by the establishment of any territorial boundaries. We do not question what is so earnestly said by counsel for plaintiffs in error in respect to the disagreeable results from the neighborhood of such houses and people; but if the power to prescribe territorial limits exists, the courts cannot say that the limits shall be other than those the legislative body prescribes. If these limits hurt the present plaintiffs in error, other limits would hurt others."

After citing Dillon on Municipal Corporations, to the effect that individual rights may be regulated by the police power, the court say:

"The learned author, in these and accompanying sentences, is discussing the rule when legislative action operates directly upon the property of the complainant and where injuries alleged to result are the direct consequences of legislative action. If under such circumstances the individual has no cause of action, *a fortiori* must the same be true when the injuries are not direct but consequential, when his property is not directly touched by the legislative action, but is affected in only an incidental and consequential way."

Coming to the question postponed for final consideration, does the ordinance constitute a discrimination as contradistinguished from a distinction which we have hitherto been considering? In other words, is it as fair to the negroes as to the whites? First, the negroes cannot move into the white blocks, neither, however can the whites move into the negro blocks. Secondly, as to the amount of space allotted to each. The method of determining the character of the block is as fair as could be devised. It is possible to imagine a state of affairs, however, in which the negroes were in the majority in no block, in which case the law would in fact work out unfairly and would, under the doctrine of *Yick Wo* v. *Hopkins*,[17] be unconstitutional. This is not in fact the case in Baltimore, as the large black population is pretty well segregated and

[16](1900) 177 U. S. 587.
[17]*Supra.*

has always been so, the object of the ordinance being to prevent a further invasion of negroes into white neighborhoods. Again, it might be shown as a matter of fact that a considerable number of negroes lived scattered among the white blocks while comparatively few whites resided in the negro blocks. This would result in giving the whites a disproportionate space to move around in as compared to the negroes. A good deal would depend, we suppose, on whether the number of negroes in white blocks is considerably greater than whites in negro blocks. Unless such facts are proven as facts, however, the law would seem to be, in respect to space allotted, impartial on its face. These difficulties could be obviated by providing that those houses in white blocks now inhabited by negroes should in the future be inhabitable only by negroes and *vice versa.* However, the law seems fair on its face and probably is so in fact in that it allots to each race the space which, by actual experience, it is shown that they desire.

Finally it may be objected that the negro neighborhood is manifestly less desirable than the white. The answer to this is that the character of the improvements upon land is in the arbitrary discretion of the owner. There is nothing to prevent the improvements in the negro sections from being made the finest in the city.

Passing to discriminations in fact, a more serious objection might be that many of the negroes live in alleys which can not be made as desirable as streets. Still, on the other hand, many whites live in courts and alleys, for example in the slum districts; like the white, the negro sections graduate from alley houses to remarkably good houses on once fine, white, residential streets; also it is an economic necessity with the negroes just as with the poor whites, the only difference being the proportionately larger number of well-to-do whites, hence it would be a hardship to compel the negroes to move from the alleys. The court would hardly cavil at such inequalities necessarily arising from the economic condition of the two races.

A somewhat microscopic search for technical discriminations in the proposed ordinance, has, we think, failed to disclose them. Such being the case, we think that reasonable grounds exist for holding that under the present state of the decisions the proposed ordinance is not a denial of the equal protection of the laws or a deprivation of life, liberty or property without due process of law.

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